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No. 1 OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD STEVEN PHILLIP,
Petitioner,

v.

RANDY LEE, Warden,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED

I. WHETHER THE HABEAS CORPUS STATUTE OF LIMITATIONS, 28 U.S.C. § 2244(d), SHOULD BE EQUITABLY TOLLED WHEN THE ONE YEAR LIMITATIONS PERIOD RUNS OUT WHILE PETITIONER'S COUNSEL IS AWAITING RECEIPT OF THE FINAL STATE COURT ORDER, WHICH GETS LOST IN THE MAIL?

II. WHETHER PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED AT PETITIONER'S STATE TRIAL ON DRUG TRAFFICKING CHARGES WHERE A KEY WITNESS WAS ARRESTED, CHARGED WITH PERJURY, THROWN IN JAIL AND COERCED INTO CHANGING HIS TESTIMONY TO FAVOR THE STATE, AND DEFENSE COUNSEL FAILED TO OBJECT AT TRIAL OR ON DIRECT APPEAL?

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RONALD STEVEN PHILLIP,
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RANDY LEE, Warden,
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PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald Steven Phillip respectfully prays that a writ of certiorari issue to review the judgment of the Fourth Circuit United States Court of Appeals, entered on November 15, 2000.

OPINION BELOW

The opinion of the Fourth Circuit is unreported. *Phillip v. Lee,* 2000 U.S. App. LEXIS 29125 (unpublished). *See,* App. 20-21.

JURISDICTION

The judgment of the Fourth Circuit U.S. Court of Appeals was entered on November 15, 2000. This petition is therefore timely filed under this Court's Rule 13. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. Const. Am. VI: In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. Const. Am. XIV: . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2244(d): (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . . (2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

STATEMENT OF THE CASE

State Court Proceedings:

Petitioner was tried to a jury in the Guilford County, North Carolina Superior Court on June 29, 1995, upon indictments charging him with trafficking in cocaine by possession and by transportation in violation of N.C. Gen. Stat. § 90-95(h)(3). Upon verdicts of guilty, petitioner was sentenced to a minimum of 175 up to a maximum of 219 months in prison (that is, 14.6 to 18.3 years). The N.C. Court of Appeals found no error and the N.C. Supreme Court denied certiorari review. *State v. Ronald Steven Phillip,* No. COA96-18 (N.C. App. 1996) (unpublished), *cert. denied,* 345 N.C. 758, 485 S.E.2d 306 (1997).

On May 8, 1998, petitioner, through counsel, filed a postconviction *Motion for Appropriate Relief* in the Guilford County Superior Court, seeking an evidentiary hearing and a new trial. On June 24, 1998, the court convened a non-

evidentiary hearing, and denied relief by Order dated July 10, 1998. *See,* App. 1-6. The N.C. Court of Appeals denied petitioner's application for certiorari review by order dated September 14, 1998. *See,* App. 7.

Although the September 14, 1998 order was supposed to have been mailed to the parties, undersigned counsel never received it in the mail. Unbeknownst to petitioner or his counsel, the federal habeas statute limitations expired on November 16, 1998. On February 17, 1999, undersigned counsel telephoned the Clerk of the North Carolina Court of Appeals and learned for the first time that the court had denied certiorari on September 14, 1998.

On February 17, 1999, upon learning that certiorari had been denied, undersigned counsel immediately requested relief from the September 14, 1998, order, but this request was denied by the N.C. Court of Appeals on February 23, 1999.

Federal Habeas Proceedings:

Petitioner's counsel immediately began preparation of federal pleadings. On March 4, 1999, counsel sent a *Petition for a Writ of Habeas Corpus*, related pleadings and filing fee to the Clerk of the U.S. District Court for the Middle District of North Carolina, via Federal Express, and it was received in that court on March 5, 1999.[1]

Respondent sought summary judgment on statute of limitations grounds under 28 U.S.C. § 2244(d). Petitioner acknowledged that the statute had run, but requested equitable tolling on grounds that he had been diligent and the nonreceipt of the State court order was an extraordinary

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[1] Petitioner's counsel was informed by the clerk's office that the habeas petition was received on March 5, 1999. However, due to the court's internal screening procedure for habeas corpus petitions, it was not stamped "filed" until March 26, 1999.

circumstance beyond his control.

Petitioner presented uncontroverted declarations to the effect that the reasonable practice of skilled and diligent attorneys in criminal appellate practice in North Carolina is to await receipt of orders from the N.C. Court of Appeals in ordinary course of the mail, and the order of the N.C. Court of Appeals had never been received in the mail by undersigned counsel. Even a period of many months between filing of a case and receipt of the N.C. Court of Appeals' decision is considered to be well within normal expectations. Petitioner established these facts in the district court below by filing authoritative declarations from (1) North Carolina Appellate Defender Malcolm Ray Hunter, probably the most experienced criminal appellate attorney in North Carolina, (2) Stanley Hammer, a certified specialist in criminal appellate practice, (3) Ken Rose the Director of the Center for Death Penalty Litigation, and (4) undersigned counsel. Respondent filed no countervailing declarations.

On March 24, 2000, U.S. Magistrate Judge Paul T. Sharp rejected petitioner's request for equitable tolling and recommended that the habeas petition be denied as untimely under 28 U.S.C. § 2244(d), and incidentally found the petition to be without merit. *See,* App. 8-18. Petitioner filed objections, but on July 21, 2000, U.S. District Judge William L. Osteen, Sr., entered an order adopting the Magistrate Judge's recommendation and dismissing the petition. *See,* App. 19.

By decision of November 15, 2000, a panel of the Fourth Circuit denied a certificate of appealability and dismissed the appeal for the reasons stated by the district court. App. 20-21. It is from this dismissal that petitioner now seeks relief in this Honorable Court.

Facts Underlying Petitioner's Constitutional Claims:

At the state court trial, the State presented evidence that petitioner was riding as a passenger in a rental car driven by one Rodney Squires. A state trooper stopped the car on an interstate highway in North Carolina, and a search consented to by Squires revealed a substantial quantity of cocaine hidden in the car.

This evidence would have been insufficient, as a matter of state law, to show that petitioner "possessed" the drugs found in the car since all appearances were that the car and its contents were under the control of Rodney Squires – but for the testimony of one Gregory Gilley. Gilley testified that petitioner had solicited Gilley to come from New York to North Carolina and give false testimony that Gilley, not petitioner, was responsible for hiding the cocaine in the car. Under state law, Gilley's testimony supplied a "suspicious circumstance" implicating petitioner in the possession of the cocaine, and allowing the case to reach the jury and sustaining the jury's guilty verdict.

However, Gilley testified favorably to the State under extremely coercive pressures: A week before petitioner's trial, Gilley had testified at the trial of Rodney Squires to the effect that he, Gilley, had hidden the cocaine in the car, not Squires. Immediately following Gilley's testimony on behalf of Squires, Gilley was accosted by three State Troopers in the men's room outside the courtroom. He was arrested and brought to the prosecutor's office. There, he was interrogated without benefit of counsel by no less than five State officials (three State Troopers, an S.B.I. Agent and an Assistant District Attorney). Gilley was then charged with perjury, a Class F felony carrying a possible maximum penalty of 59 months imprisonment.

Gilley spent that night in jail. The next morning, he was brought back to the courtroom and recalled to the witness stand by the State. He testified to the State's

satisfaction against Rodney Squires, and inculpated petitioner Phillip as well. At this time, Gilley was still without benefit of counsel. During his testimony, Gilley was held in contempt of court and sentenced to ten days in jail for refusing to answer a question from Squires' attorney. After Squires was convicted, Gilley was placed in the Guilford County Jail under a $100,000 secured bond, far from his home in New York. He was given a court date on the perjury charge almost a month in the future, and appointed a lawyer.

It was after Gilley had spent a week in jail on the charge of perjury in the Squires case that he was called by the State to testify at the trial of petitioner Phillip. Gilley testified against petitioner to the State's satisfaction to the effect that petitioner had solicited his false testimony, resulting in petitioner 's conviction. The very next day, the State voluntarily dismissed Gilley's perjury charge and he was released.

The forgoing coercive pressures placed by the State upon it's key witness were not made the subject of any motion or objection by petitioner's trial or appellate counsel in the state court proceedings. The State postconviction court held that the State's treatment of witness Gilley did not violate petitioner's due process rights, that the failure to raise an objection thereto did not constitute ineffective assistance of trial or appellate counsel, and that all issues were procedurally barred under N.C. Gen. Stat. § 15A-1419(b) for failure to raise them on direct appeal. *See,* App. 1-6.

Petitioner argued to the court below that these facts established both a due process violation under *Webb v. Texas,* 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972), and *United States v. McCloskey,* 682 F.2d 468, 479 (4th Cir. 1982) (both decisions establishing that due process is violated when a defendant is convicted through testimony of a witness who has been coerced into materially altering his or her testimony in favor of the state by means of a threatened perjury prosecution), and a violation of the right to effective

assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner further argued that the State court's finding of procedural bar was manifestly incorrect as applied to the claim of ineffective assistance of counsel on direct appeal, and as applied to ineffective assistance of trial counsel based upon all of the matters regarding Gilley that were outside the trial record.

The Magistrate Judge's Recommendation relied upon by the court was almost entirely concerned with the statute of limitations issue; it simply mentioned, without explanation, that petitioner's habeas petition was "without merit." *See,* App. 18.

REASONS FOR GRANTING THE WRIT

I. EQUITABLE TOLLING OF THE HABEAS CORPUS STATUTE OF LIMITATIONS, 28 U.S.C. § 2244(d), SHOULD NOT BE DENIED TO A HABEAS PETITIONER WHERE THE LIMITATIONS PERIOD LAPSED DUE TO THE LOSS OF A STATE COURT ORDER IN THE MAIL.

Although this Court has never explicitly so held, there is little question that the limitations period of 28 U.S.C. § 2244(d) is subject to "equitable tolling," at least in principle. *See, Harris v. Hutchinson,* 209 F.3d 325, 328-29 (4th Cir. 2000), *citing, Davis v. Johnson,* 158 F.3d 806, 810 (5th Cir. 1998); *Miller v. New Jersey State Dep't of Corrections,* 145 F.3d 616, 617-18 (3d Cir. 1998); *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir. 1998); *Calderon v. United States District Court,* 128 F.3d 1283, 1288-89 (9th Cir. 1997).

The limitations period is subject to equitable tolling where, "due to circumstances external to the party's own conduct -- it would be unconscionable to enforce the limitation period against the party and gross injustice would

result." *Harris, supra* (ultimately denying equitable tolling where petitioner's counsel miscalculated the date upon which the limitations period would expire). The petitioner must show exercise of "reasonable diligence" in pursuing his claims – mere excusable neglect is insufficient. *Miller v. New Jersey State Department of Corrections, supra.*

When a litigant seeks equitable relief from a rigid application of a statutory limitations period for initiating suit, "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965).

A prisoner *cannot* file his or her federal habeas petition until the last State Court has issued a written order denying his constitutional claims. *Cf., Artuz v. Bennett,* ___ U.S. ___, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000). The legislative policy behind the exhaustion requirement is clearly to encourage habeas litigants to *wait* for the last State court to issue its order, before proceeding into federal court. The limitations period contained in 28 U.S.C. § 2244(d) therefore should not be applied in such a manner as to discourage habeas petitioners from patiently waiting for the State courts to act.

In another case, the Fourth Circuit expressly left open the question of whether delayed receipt of the final State Court order justifies equitable tolling under 28 U.S.C. § 2244(d). *Hernandez v. Caldwell,* 225 F.3d 435, 439 n. (4th Cir. 2000). The Fourth Circuit has not previously addressed the question whether *loss* of a state court order in the mail justifies equitable tolling.

The decision of the Fourth Circuit in the case at bar effectively denies equitable tolling to a habeas petitioner who has diligently pursued his state and federal remedies, and misses the federal limitations period because the required last State Court order showing exhaustion of state remedies is lost in the mail.

First, the Court below held that equitable tolling was *foreclosed* by petitioner's own lack of "due diligence" simply because he first filed his state postconviction pleadings with only two months left on the federal limitations clock. *See,* App. 15. That cannot be right. Filing state postconviction pleadings with two months still left on the federal clock effectively tolled the federal limitations period under 28 U.S.C. § 2244(d)(2) with ample time remaining for preparation of federal pleadings, and shows, if anything, diligence and attention to the federal limitations statute.

Second, the court below held it was a "close question" whether petitioner's counsel exercised "due diligence" in relying upon the U.S. Mail in his communications with the North Carolina Court of Appeals, awaiting a decision for five months before telephoning the court to inquire into the status of the case. *See,* App. 16. The Court below simply ignored petitioner's submission of uncontroverted declarations from three other attorneys, unconnected with this case and exceptionally well-positioned to know what constitutes reasonable and diligent conduct in North Carolina criminal appellate practice, to the effect that his counsel's conduct was reasonable and diligent.

Finally, the Court below expressed skepticism that the State court order even was lost as petitioner claimed, noting "the difficulty of Petitioner's proof." *See,* App. 17. The Court fails to note that the loss of the order in the mail was *never contested* by the Respondent, either by argument or by submission of countervailing declarations. On summary judgment, the facts are to be taken in the light most favorable to the non-moving party. This petitioner submitted as much proof that the State court order was not delivered to him as will *ever* be available in a case such as this, and this was sufficient to establish the point for purposes of resisting summary judgment.

Thus, the Court below has contorted reason and fairness to deny equitable tolling to this petitioner, in a manner

that would deny equitable tolling to *any* petitioner who claims that he simply was not informed of the State court's decision in his case through a manifestly apparent failure of mail delivery.

The decision of the Court below is squarely in conflict with the decision of the Fifth Circuit U.S. Court of Appeals in *Phillips v. Donnelly,* 216 F.3d 508 (5th Cir. 2000). The Fifth Circuit held that a four-month delay in notification (tantamount to a "loss" of the state court order, although the opinion does not explain the cause of the delay), would justify equitable tolling if established to the court's satisfaction. The case is remarkably similar to the case at bar, down to the petitioner's surname:

> In this case, the purported delay in receiving notice of the denial was four months. And Phillips pursued the process with diligence and alacrity: he filed for an out-of-time appeal within three days of allegedly receiving notice of the denial. He then filed his federal habeas corpus appeal within one month of the denial of the out-of-time appeal. Thus, we conclude that the delay in receiving notification that Phillips describes could qualify for equitable tolling. . . .
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> . . . This all assumes that Phillips can establish that he did not receive notice of the denial of his appeal until August 29, 1997. Although we have not found any cases discussing who bears the burden of proof concerning equitable tolling in the AEDPA context, we believe the defendant should bear this burden. . . . We therefore REMAND the case to the district court for a hearing as to whether Phillips first received notice of the

denial on August 17, 1997.

216 F.3d at 511 (emphasis added). *See also, Brandon v. United States*, 89 F. Supp. 2d 731 (E.D.Va., March 2, 2000) (equitable tolling granted where neither petitioner nor his counsel received notice of a state court order until after the limitations period had expired); *Vasquez v. Greiner*, 68 F. Supp. 2d 307, 310 (S.D.N.Y. 1999) (factual dispute as to when petitioner first learned of the finality of his conviction precluded dismissal of the petition as untimely); *Baskin v. United States*, 998 F. Supp. 188, 190 (D. Conn. 1998) (equitable tolling granted where petitioner's counsel failed to notify him of the denial of certiorari until thirteen months after it occurred).

In the case at bar, petitioner's non-receipt of the state court order was established by the declaration of undersigned counsel. The reasonableness and diligence of undersigned counsel's conduct was established by declarations of three other attorneys exceptionally well-positioned to know what constitutes reasonable and diligent conduct. At a minimum, petitioner's uncontroverted declarations precluded summary judgment for respondent on the limitations issue, and entitled petitioner to a hearing as in *Phillips v. Donnelly*.

This case is worthy of review by the United States Supreme Court because (1) the contours of the doctrine of equitable tolling have never been addressed by this Court in the context of 28 U.S.C. § 2244(d), and Circuit level decisions have provided only vague guidance; (2) the decision of the Court below is in conflict with the decision of the Fifth Circuit in *Phillips v. Donnelly, supra*; and (3) the decision of the Court below wrongly burdens both habeas petitioners and their counsel with heightened and unrealistic burdens of showing "due diligence" in order to be eligible for equitable consideration from the Court.

For these reasons, petitioner respectfully prays that this Court will issue its Writ of Certiorari and order full

review of the decision of the court below denying equitable tolling.

II. IT CLEARLY VIOLATES A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL TO CONVICT HIM UPON THE TESTIMONY OF A KEY WITNESS WHO COMPLETELY CHANGES HIS TESTIMONY UPON BEING ARRESTED BECAUSE OF HIS TESTIMONY, CHARGED WITH PERJURY AND THROWN IN JAIL UNDER A HIGH BOND, AND DEFENSE COUNSEL FAILS TO OBJECT EITHER AT TRIAL OR ON DIRECT APPEAL.

A principle witness against this petitioner was coerced by being imprisoned and prosecuted for perjury during petitioner's trial, as a result of which the witness's testimony changed in the state's favor and to petitioner's prejudice. This clearly violated due process under *Webb v. Texas*, 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972) and its progeny. *See, e.g., United States v. McCloskey*, 682 F.2d 468, 479 (4th Cir. 1982) (prosecutor's threat to reinstate indictment against defense witness if her testimony was self-incriminating caused her to invoke Fifth Amendment privilege); *Bray v. Peyton*, 429 F.2d 500, 501 (4th Cir. 1970) (prosecutor's arrest of defense witness on the basis of his testimony had an intimidating effect on the defendant's three other witnesses).

In the case at bar, Gregory Gilley testified under extraordinary coercion. One can scarcely imagine a more effective way to crush a defense witness into changing his tune than to arrest him in the courthouse on account of his exculpatory testimony, threaten to prosecute him for the conduct of which the defendant stands charged, actually charge him with perjury, throw him in jail under $100,000 bond, and then keep him there until he testifies favorably to

the State.

In *Webb*, this Court held that due process was violated because the trial court's unnecessarily strong admonition of the consequences of perjury effectively deprived the defendant of a witness's exculpatory testimony. If the State's treatment of Gregory Gilley does not fall reasonably within *Webb's* prohibition of an "unnecessarily strong" admonition of the potential consequences perjury, then *Webb* is a dead letter.

These principles are familiar to the courts and defense attorneys of North Carolina. State law decisions such as the following, from the North Carolina Court of Appeals, have put members of the bar on notice to raise a constitutional objections under circumstances such as those presented in the case at bar:

> Substantial government interference with the voluntariness of a witness's choice of whether or not to testify and with the content of that testimony infringes on a defendant's constitutional right to present witnesses to establish his defense. *Webb v. Texas,* 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972); *United States v. Hammond,* 598 F.2d 1008 (5th Cir. 1979); *Bray v. Peyton,* 429 F.2d 500 (4th Cir. 1970). . . .
>
> We hold that defendant in this case was denied his due process rights by the prosecution's intimidation of Gregory Moore which resulted in Moore's returning to the stand and repudiating his earlier testimony that had been exculpatory to defendant. There can be little doubt that the confrontation by Detective Phillips with the threats of prosecution for perjury was responsible for Moore's subsequent course of action. Although the witness was not intimidated by

> the judge as was the case in *State v. Rhodes, supra,* we find that Moore's intimidation by a police detective and the offer of immunity by the District Attorney, who are symbols of government's power to prosecute offenders, likewise deprived defendant of due process of law. *See, United States v. Morrison,* 535 F.2d 223 (3d Cir. 1976). A criminal defendant has the right to present his own version of the facts and to present his own witnesses without unwarranted judicial or prosecutorial interference. *Id.* The intimidation of the witness Moore infringed on defendant's constitutional right to have Moore's freely-given testimony.

State v. Mackey, 58 N.C. App. 385, 387-88, 293 S.E.2d 617, 618-19 (1982), *review denied, appeal dismissed,* 306 N.C. 748, 295 S.E.2d 761 (1982). *See also, State v. Melvin,* 326 N.C. 173, 388 S.E.2d 72 (1990).

In the case at bar, Gilley's testimony was essential to the State because petitioner's mere presence as a passenger in the car was insufficient as a matter of law to convict him of trafficking in narcotics found hidden in the trunk of the car. All of the evidence pointed to Rodney Squires as the one in possession and control of the car and its contents: he was driving, he was listed on the rental agreement as an authorized driver, he was the one in charge who spoke with the State Trooper and authorized the search. None of the other evidence rose to the level of "suspicious circumstances" sufficient in themselves to justify submitting the case to the jury.[2]

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[2] *See, State v. McLaurin,* 320 N.C. 143, 146-47, 357 S.E.2d 636 (1987) (where control of a place where contraband is found is non-exclusive, constructive possession may not be inferred without other

The trial attorney defending this case could have readily located *State v. Mackey, Webb v. Texas,* and other case authorities cited above, and lodged a meritorious objection to Gregory Gilley's testimony on grounds that he was then in jail under a charge of perjury relating to his potential testimony in the case. Such an objection would have resulted in Gilley's testimony being excluded, and the State would have had insufficient evidence remaining to reach the jury as a matter of state law. Instead, trial counsel did nothing. This failure clearly violated petitioner's right to effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its progeny. *See, Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639 (1986) (a single, isolated error can constitute ineffective assistance of counsel "if that error is sufficiently egregious and prejudicial").

At a minimum, petitioner was entitled to an evidentiary hearing at which to prove these violations of due process and the right to effective counsel, yet the state postconviction court, the court below, and the panel all denied him that opportunity.

The decision of the court below is in direct conflict with this Court's decision in *Webb v. Texas, supra.* This issue presented is exceptionally important because of the

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incriminating circumstances); *State v. Minor,* 290 N.C. 68, 224 S.E.2d 180, 185 (1976) (evidence that defendant was a passenger in co-defendant's car, and that he was a friend and visitor of co-defendant, was insufficient to establish defendant's constructive possession of marijuana found in the back seat and trunk of car); *State v. Boone,* 310 N.C. 284, 311 S.E.2d 552 (1984) (where defendant was a passenger in a car, and marijuana was found in the trunk where it had been placed by a third party, there was insufficient evidence of constructive possession by defendant); *State v. Weems,* 31 N.C. App. 569, 230 S.E.2d 193 (1976) (evidence that defendant was a passenger in a car was insufficient to prove constructive possession of drugs found in the console of the car and behind the seat).

fundamental due process rights that stand to be lost when a State is allowed to obtain a conviction by threatening, jailing and prosecuting a defense witness because of his testimony, thereby converting him into a state's witness.

Furthermore, the State court's finding of procedural bar – which has never been mentioned in any of the federal court decisions in this case – is highly suspect. According to the State court order, petitioner's claim that both his trial *and appellate* counsel were ineffective for failing to raise the *Webb v. Texas* issue in the direct appeal was defaulted because the issue of ineffective counsel was not raised in the direct appeal itself. While it is not at all clear that ineffective assistance of trial counsel must be raised on direct appeal in North Carolina,[3] it is obvious that a claim of ineffective *appellate* counsel cannot possibly be raised until after the direct appeal is over. In the end, the state court's procedural default ruling is inextricably bound to its decision rejecting petitioner's underlying due process claim – if petitioner wins the due process issue, then either his trial counsel or his appellate counsel surely should have raised an objection, and petitioner should win his ineffective assistance claim as well.

For these reasons, petitioner respectfully prays that this Court will order full review the decision of the court below denying petitioner relief on grounds his constitutional rights to due process and effective assistance of counsel were violated.

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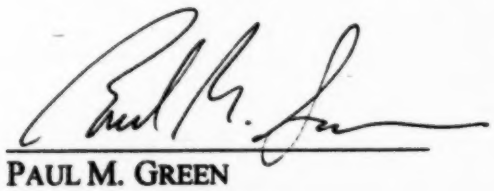
[3] In general, ineffective assistance of counsel claims are supposed to be raised in a postconviction motion for appropriate relief. *See, State v. Vickers,* 306 N.C. 90, 95, 291 S.E.2d 599, 603 (1982).

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of *certiorari* issue to review the decision of the Fourth Circuit United States Court of Appeals, to the end that the judgment below be reversed.

Respectfully submitted, this the 6th day of February, 2001.



PAUL M. GREEN
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1304 CAROLINA AVE.
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(919) 286-2212

(2)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD STEVEN PHILLIP,
Petitioner,

v.

RANDY LEE, Warden,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Fourth Circuit

APPENDIX

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22 pp

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
94 CBS 70261, 70262

RONALD STEVEN PHILLIP
Petitioner,
vs. ORDER
STATE OF NORTH CAROLINA,
Respondent.

THIS CAUSE COMING ON TO BE HEARD, and being heard before the Honorable Howard R. Greeson, Jr., presiding Superior Court Judge, upon a Motion for Appropriate Relief filed with this Court on or about May 11, 1998. This matter came on for hearing on June 24, 1998 in Guilford County Superior Court, High Point Division The Petitioner was not present but was represented by Paul M. Green of the Durham County bar. The State was represented by Assistant District Attorney, Randy Carroll.

In his motion the Petitioner alleges:

1. The State intimidated witness Gregory Gilley (Sanders) in violation of Petitioner's rights under the United States and North Carolina Constitutions.

2. Petitioner's counsel was ineffective in failing to object to the State's intimidation of Gregory Gilley and presentation of his coerced testimony in its case in chief.

3. Counsel's continued representation of Petitioner after defense witness Gregory Gilley admitted to perjury was ineffective due to a resulting conflict of interest between attorney and client and damage to counsel's credibility; and

4. Petitioner is entitled to a new trial based on the record or, in the alternative, to an evidentiary hearing.

Based upon the Motion filed by the Petitioner, the answer filed by the State and the records in this case and the statements and arguments of counsel, the Court concludes that only legal issues are presented and that the Court may resolve these issues without conducting an evidentiary hearing pursuant to G.S. 15A-1420(c).

After conducting a non-evidentiary hearing in this case, the Court makes the following FINDINGS OF FACT:

1. Petitioner was arrested on October 25, 1994 and charged with trafficking in cocaine.

2. Petitioner was indicted for Trafficking by Possession of Cocaine in 94 CRS 70261 and Trafficking by Transportation of Cocaine in 94 CRS 70262 on March 20, 1995. Assistant Public Defender, David Clark, was appointed to represent Petitioner.

3. Rodney Squires was indicted as a CO-defendant and charged with the same offenses as Petitioner. Attorney Richard Dailey was appointed to represent Squires.

4. The Squires case was called for trial first; it was called by the State on June 21, 1995 before the Honorable Catherine Eagles, presiding Superior Court Judge.

5. A witness was called by the Defendant Squires in his case who testified that his name was Gregory Sanders. He eventually testified that because of something to do with his adoption his name was actually Gregory Gilley but that both names were legally his. Throughout the remainder of this

order, this witness will be referred to simply as "Gilley."

6. Attorneys for both Squires and Philip had an opportunity to talk to Gilley prior to his being called as a witness in Squires' trial. Gilley testified that both attorneys advised him that he could not be charged with anything in North Carolina based on his statement to them.

7. When Gilley took the stand for the defense in Squires' trial, his testimony exculpated both Defendants by admitting possession of the very drugs for which Squires was being tried.

8. David Clark, counsel for the Petitioner herein, Phillip, was present during the testimony of Gilley.

9. After Gilley testified, he was approached by law enforcement in the men's room of the courthouse where he was placed under arrest for possession of a controlled substance based upon his sworn testimony claiming ownership of the very drugs for which Squires was being tried.

10. He was advised of his Miranda rights and thereafter gave a contrary statement to law enforcement.

11. He admitted that be had just lied under oath and gave false testimony pursuant to an arrangement worked out between he and Petitioner.

12. Gilley's new statement was inculpatory as to both Defendants; he also admitted he had lied under oath about his age and social security number.

13. Gilley was then taken before the magistrate where be was booked on the charge of perjury.

14. The next morning the state moved that it be allowed to re-open its evidence after advising Judge Eagles about what had developed the previous evening. During that hearing Richard Dailey, counsel for the Defendant Squires, objected to the State calling Gilley as a witness and moved for a mistrial based on these same events. After hearing arguments of counsel for both the State and the Defendant Squires, the Court denied the motion for a mistrial and allowed the State's motion to re-open its case.

15. Gilley was then called as a rebuttal witness for the State and gives a different statement from what he had given under oath the previous day. He admitted to lying under oath and gave testimony that now incriminated both Squires and Petitioner.

16. The jury returned verdicts of guilty as charged in both charges against Squires.

17. The State called Petitioner's case for trial on June 28, 1995 before the Honorable Charles Lamm, presiding Superior Court Judge.

18. In the interim, counsel for Petitioner sent his investigator, Richard Jackson, to the Guilford County jail in Greensboro to talk with Gilley.

19. Gilley was called to testify for the State against Petitioner in its case in chief and gave essentially the same testimony as be did when he testified as a rebuttal witness for the State in Squires' trial.

20. Gilley was cross examined at length in a very skillful and aggressive manner by David Clark, counsel for Petitioner. David Clark represented Petitioner at his trial with full knowledge that Gilley had recanted his original story and had

admitted that be had lied under oath the first time be testified and effectively pointed out Gilley's admitted lies to the jury.

21. There was no direct evidence brought out in either Petitioner's or Squires' trial that Gilley was intimidated, threatened or coerced to change his testimony by either the prosecutor or law enforcement. Petitioner cited *State v Melvin,* 326 NC 173 and *State v Mackey,* 58 NCAPP 385 to support his contention that his constitutional due process rights were violated by the state's coercing Gilley to change his testimony. However, the Court notes that in both of those cases there was direct evidence of intimidation of a witness by either the prosecutor, law enforcement or both.

22. The Court finds there was no prosecution intimidation of Gilley like what occurred in *Melvin* and *Mackey.* Also, the compulsion in those cases occurred at the trial of the defendant and the compulsion, if any, in this case occurred at the CO-Defendant's trial.

23. David Clark, trial counsel for Petitioner, had full notice of what Gilley was going to say and knew that he had repudiated his earlier testimony.

24. All of these circumstances were also known to appellate counsel for Petitioner.

Based upon the foregoing findings of fact, the Court makes the following CONCLUSIONS OF LAW:

1. That Petitioner was in a position to adequately raise these issues on direct appeal to the North Carolina Court of Appeals but failed to do so and his motion is subject to denial pursuant to G.S. 15A-1419(a)(3).

2. That Petitioner cannot demonstrate good grounds to excuse the denial of his motion pursuant to G.S. 15A-1419(b) nor has he demonstrated that denial of his motion will result in any prejudice or will result in a fundamental miscarriage of justice.

3. That the conduct of the prosecutor and law enforcement in their dealings with the witness Gilley did not constitute intimidation

4. That no errors were made by David Clark in his representation of Petitioner, especially none that would rise to the level of ineffective assistance of counsel as contemplated by *Strickland v Washington*, 466 US 668 (1984).

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Petitioner's Motion for Appropriate Relief be and the same is hereby denied in each and evey respect. IT IS FURTHIR ORDERED that the Clerk of Superior Court of Guilford County shall cause a copy of this Order to be forwarded to Paul M. Green, counsel for Petitioner, to the Petitioner, the State Department of Correction, the Parole Commission and the Office of the District Attorney for the Eighteenth Judicial District, High Point Division.

This the 10th day of July, 1998.

/s/ Howard R. Greeson, Jr.
Presiding Superior Court Judge

No. COAP98-516
North Carolina Court of Appeals
****

STATE OF NORTH CAROLINA

From Guilford
V (94 CBS 70261, 70262)

RONALD STEVEN PHILLIP

****

ORDER

The following order was entered:

The petition filed in this cause on the 24th day of August 1998 designated "Petition for Writ of Certiorari" is denied.

By order of the Court this the 14th day of September 1998.

The above order is therefore certified to the Clerk of Superior Court Guilford County.

Witness my hand and official seal this the 14th day of September 1998.

/s/ John H. Connell
Clerk of North Carolina Court of Appeals

CSC Orig
cc:
Mr. Paul M. Green
Hon. Randy Carroll
Ms. Gail E. Weiss

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RONALD STEVEN PHILLIP,	)	
Petitioner,	)	
v.	)	**1:99CV00243**
RANDY LEE, Warden,	)	
The Attorney General of the	)	
State of North Carolina, et al.,	)	
Respondents.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner Ronald Steven Phillip, a prisoner of the state of North Carolina. brought this federal habeas action pursuant to 28 U.S.C. § 2254 challenging the constitutional validity of the sentence imposed for his trafficking cocaine by possession and transportation conviction in Guilford County Superior Court in cases 94 CRS 70261 and 94 CRS 70262. (Docket Nos. 2 & 6) Petitioner appealed. but the North Carolina Court of Appeals affirmed and the North Carolina Supreme Court denied certiorari. *Id.*

On May 8. 1998, Petitioner filed a motion for appropriate relief (MAR). A non-evidentiary hearing was held on June 24. 1998 in the Guilford County Superior Court, at which Petitioner was represented by present counsel, Mr. Paul M. Green. The MAR was denied on July 10, 1998 by Superior Court Judge Greeson, Jr. Petitioner then submitted a petition for certiorari to the North Carolina Court of Appeals which was denied on September 14. 1998. *Id.*

The Habeas Corpus Petition

Petitioner, through counsel, filed the present federal habeas petition on March 26, 1999. (Docket No. 1) A review

of the state court record reveals that Petitioner has raised the substance of his present claims in state court as required by 28 U.S.C. § 2254(b)(1)(A). Accordingly, Respondents concede that Petitioner has exhausted his state remedies. (Docket No. 4, ¶ 2) Respondents move to dismiss on the grounds that the one-year limitations period ran before Petitioner filed his federal habeas. (Docket Nos. 5 & 6) Petitioner replies that his habeas petition is not barred by the one-year limit and, further, the one-year limit should be equitably tolled because Petitioner was allegedly never sent notice that certiorari had been denied on September 14, 1998 by the North Carolina Court of Appeals. (Docket Nos. 9 & 10) These matters are now before this Court for a ruling. *See* Rule 8, Rules Governing § 2254 Cases.

DISCUSSION

Respondent's statute of limitations affirmative defense will be considered first. The one-year limitations period applicable to § 2254 habeas petitions is set forth in 28 U.S.C.A. § 2244(d)(l). The statute provides, in applicable part, that the one-year limit begins to run on the date judgment became final by the conclusion of direct review or the expiration of the time for seeking such review and, further, that the time in which a properly filed application for state post-conviction relief is pending shall not be included in the one-year limitations period. *See* 28 U.S.C.A. § 2244(d)(2).

Both parties agree that Petitioner's one-year period began running on July 9, 1997. (Docket No. 10, Petitioner's Br. in opposition to Respondent's motion for summary judgment at 3; Docket No. 6, Respondent's Br. in support of motion for summary judgment at 3) In addition, both parties agree that tolling pursuant to 28 U.S.C. § 2244(d) would begin on May 8, 1998 when Petitioner filed his MAR. Further, both parties agree that tolling pursuant to § 2244(d)

would cease as of September 14, 1998, when the North Carolina Court of Appeals denied certiorari review of the denial of Petitioner's MAR. Recently, the Fourth Circuit decided *Taylor v. Lee,* 186 F.3d *557,* 561 (4th Cir. 1999), *cert. denied,* ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2000 WL 220371 (2000), in which it held that the one-year limitations period of § 2244(d) is tolled for the entire pendency of state post-conviction proceedings, i.e., from the initial filing to the final disposition by the highest state court. Applying *Taylor,* the one-year limit for Petitioner was tolled 130 days (July 9, 1997 to September 14, 1998), and, as Petitioner asserts, the limitations period for Petitioner ran on November 16, 1998. (Docket No. 10, Petitioner's Br. in opposition to Respondent's motion for summary judgment at 6) Petitioner submitted his habeas petition for filing no earlier than his signature date of March 4, 1999 and, under the applicable statutory language, this petition is, indeed, untimely.

The matter does not end there, however, because Petitioner asserts that the limitations period can be equitably tolled and that the circumstances of his case justify so doing. Specifically, Petitioner claims that the North Carolina Court of Appeals either did not send, or the United States Postal System did not deliver, the September 14, 1998 notice of denial of certiorari to counsel for Petitioner. Consequently, Petitioner contends that, at the least, the period of time from September 14, 1998 to February 17, 1999 (the date when Petitioner made inquiry--through counsel--about the status of his petition for certiorari) should be equitably tolled.

Petitioner cites no Fourth Circuit authority, nor is this Court aware of any, holding that the one-year period set forth in § 2244(d) is a statute of limitations subject to equitable tolling. Respondent contends that it is not. However, the Fourth Circuit has previously described the one-year period as a "statute of limitations." *Brown v. Angelone,* 150 F.3d 370, n. 1 & 373 (4th Cir. 1998). Further, in each circuit which has

addressed the question, the appellate court has concluded that either the limitations period of 22 44(d), or the analogous one-year limit of 28 U.S.C. § 2255, is an ordinary statute of limitations subject to the doctrine of equitable tolling. *Miller v. New Jersey State Dept. of Corrections,* 145 F.3d 616, 618 (3rd Cir. 1998)(section 2244(d)(1) is statute of limitations subject to equitable tolling; case remanded to district court for consideration of equitable tolling issue); *Davis v. Johnson,* 158 F.3d 806. 811 (5th Cir. 1998), *cert. denied,* ___ U.S. ___, 119 S.Ct. 1474, 143 L.Ed.2d 558(1999) (limitations period does not circumscribe federal jurisdiction, and can be equitably tolled in appropriate, albeit extraordinary circumstances); *Moore v. United States,* 173 F.3d 1131, 1134 (8th Cir. 1999)(one-vear limitations period of 28 U.S.C. § 2255 is a limitations period, not a jurisdictional bar); *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir.), *cert. denied,* ___ U.S. ___, 119 S. Ct. 210, 142 L.Ed.2d 173 (1998) (section 2244(d) is not jurisdictional and is subject to equitable tolling); *Sandvik v. United States,* 177 F.3d 1269, 1271 (11th Cir. 1999), *rehearing and suggestion for rehearing en banc denied,* ___ F.3d ___ (2000) (one-year provision of § 2255 is limitations period, subject to equitable tolling). *Cf. Taliani v. Chrans,* 189 F.3d 597, 598 (7th Cir. 1999)(one-year limit of section 2244 is limitations period, not jurisdictional bar, and is, in theory, subject to doctrine of equitable tolling; statutorily provided equitable tolling provisions of section 2244(d)(1)(D) may, however, leave nothing for judge-made doctrine of equitable tolling). Thus, the weight of persuasive authority favors Petitioner's contention that the one-year limit may be equitably tolled.

Some circuits have formulated principles for equitable tolling in the habeas context, and have stated that a petitioner seeking this remedy must show that extraordinary circumstances, beyond his control and unavoidable even with the exercise of diligence in pursuing his claims, prevented his compliance with the one-year limit. *Sandvik,* 177 F.3d at

1271; Jones v. Morton, 195 F.3d 153, 159 (3rd Cir. 1999) (habeas statute of limitations will not be tolled when the petitioner made no showing of unfairness, e.g., that he diligently pursued his claims and that he was prevented, in some extraordinary way, from asserting his rights). *See also Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir. 1999) ("We will permit equitable tolling of AEDPA's limitations period 'only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time,' i.e., when external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim."), *citing Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288-89 (9th Cir. 1997), *overruled in part on other grounds by Calderon v. United States Dist. Court (Kelly),* 163 F.3d 530 (9th Cir.1998)(en banc), *cert. denied,* ___ U.S. ___, 119 S. Ct. 1377, 143 L.Ed.2d *535* (1999) *and Calderon (Kelly),* 163 F.3d at 541. In reviewing a habeas petition, the Fifth Circuit noted that, in general, equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights--a garden variety claim of excusable neglect does not support equitable tolling. *Coleman v. Johnson,* 184 F.3d 398, 402, (5th Cir.) *rehearing and suggestion for rehearing en banc denied,* 196 F.3d 1259 (1999).

Cases in which equitable tolling was granted did, indeed, involve extraordinary factual circumstances in which the actions of others, beyond the petitioner's control, prevented the petitioner from timely presenting his claims. *United States v. Miller,* 197 F.3d 644, 652-3 (3rd Cir. 1999)(where district court *sua sponte* construed petitioner's earlier collateral attacks, which were filed within the one-year time period, as § 2255 motions over petitioner's protest and then dismissed on the merits, which petitioner then appealed, one-year limitations period would be tolled for the petitioner's later § 2255 motion so that he could bring all his claims in one

§ 2255 motion); *Davis,* 158 F.3d at 806-12 (equitable tolling appropriate where district court initially granted extensions well beyond one-year limit for filing federal habeas, then found habeas untimely on basis that the extensions had been beyond the power of the court to grant); *Prunty,* 187 F.3d at 1107 (because incarcerated *pro se* litigant had to depend on prison authorities to draw on his trust account, prepare a check for the habeas filing fee, and mail his check and petition to the district court, delay on the part of prison officials in complying was not within the petitioner's control and, consequently, such delay could be equitably tolled).

On the other hand, courts found that equitable tolling is not justified where the petitioner demonstrated a lack of diligence, whether that lack of diligence occurred prior to, or after, seeking state remedies. *Ott v. Johnson,* 192 F.3d 510, 514 (5th Cir. 1999) (refusal to invoke doctrine of equitable tolling with respect to untimely federal habeas corpus petition was not abuse of discretion where inmate waited to file his state habeas application just one day before expiration of one-year "grace period" for filing federal petition, inmate allowed himself little time to file federal petition once state petition was denied and the tolling of grace period ended); *Coleman,* 184 F.3d at 403 (state prisoner did not diligently pursue federal habeas relief and was not entitled to equitable tolling for approximately seven-week gap between date he submitted state petition for post-conviction relief to prison officials and date petition was stamped as filed, where prisoner waited approximately six months after denial of his state petition before filing his federal habeas petition); and *Fisher v. Johnson,* 174 F.3d 710, 715-6 (5th Cir.), *rehearing and suggestion for rehearing en banc denied,* 189 F.3d 471 (1999) (seventeen-day period in which petitioner was confined in a psychiatric ward, medicated, separated from his glasses and hence rendered legally blind, and denied meaningful access to legal materials did not justify equitable tolling of limitations period for filing habeas petition since

petitioner still had over six months to complete his federal habeas petition after his return to his usual quarters). Further, a petitioner's attorney's error or lack of diligence is chargeable to the petitioner. *Taliani,* 189 F.3d at 598 (lawyer's mistake in miscalculating the one-year limitations period would not justify equitable tolling); *Sandvik,* 177 F.3d at 1272 (equitable tolling of the limitations period was not appropriate where defense counsel sent defendant's motion by ordinary mail from Atlanta less than a week before it was due in Miami, and the untimely filing could have been avoided by mailing motion earlier or by using private delivery service or even private courier).

Courts have also found equitable tolling unjustified where the circumstances fall short of extraordinary. *Turner v. Johnson,* 177 F.3d 390, 392 (5th Cir.), *cert. denied,* ___ U.S. ___, 120 S. Ct. 504, 145 L.Ed.2d 389 (1999) (neither petitioner's unfamiliarity with legal process nor his lack of representation during applicable filing period merits equitable tolling of the one-year period of limitations on federal habeas petitions, regardless of whether this unfamiliarity is due to illiteracy or any other reason). In another case, the court was persuaded that equitable tolling was not justified based upon the petitioner's own inaction and the lack of any affirmative misconduct on the part of prison officials which could have lulled the petitioner into inaction. *Paige v. United States,* 171 F.3d 559, 561 (8th Cir. 1999) (interprison mail delay, when motion was drafted by defendant's brother and sent to him from a different prison, did not justify equitable tolling, since defendant chose someone in another prison to draft his motion and, when the deadline drew near, defendant could have drafted his own motion or sought the help of a legal aide in his own prison, and no affirmative misconduct on the prison's part lulled defendant into inaction).

In the instant case, the Court need not reach the issue of whether equitable tolling of the one-year limit is available because, even if it were, Petitioner has not demonstrated that

it is justified here. First, as Respondent notes, Petitioner did not act with diligence. Under the limitations provision of section 2244. a petitioner is allowed one year in which to complete all the state post-conviction remedies necessary to exhaust his claims (not including the time the action is pending) *and* to prepare and file his federal habeas petition. Petitioner allowed all but two months of this one-year period to expire before *beginning* his state post-conviction remedies. Petitioner fails to explain this delay. Whether or not it can be said that counsel's action—waiting over five months before inquiring about the status of the petition for certiorari when he knew or should have known that petitioner had little time left in his one-year period—constitutes diligence, Petitioner's previous lack of diligence—waiting ten months before filing his MAR—forecloses equitable tolling. The Court notes that had Petitioner expeditiously pursued his MAR, the five months counsel waited would have been of no consequence.

With reference to counsel's part in these circumstances, counsel states that he moved his office at the beginning of August, 1998. (Pr. Appendix of Exhibits, Declaration of Paul Green) He states that he informed the state court of his changed address by letter dated August 4, 1998 but that as late as August 10, 1998 the Clerk of Guilford County Superior Court had sent counsel an order addressed to counsel's *old* address. Counsel offers this in support of his position that the state court may have mis-addressed the copy of the order which was to be sent to counsel. However, an equally valid point is that this should have put counsel on alert that his move may have caused some confusion, and counsel's decision not to call the North Carolina Appeals Court sooner must be considered in light of this fact, as well as the fact that counsel knew, or should have known, that Petitioner had already allowed ten months out of his one-year period to elapse before filing a MAR.

Counsel further reports that on September 9 and November 9 of 1998, and again on January 11, 1999, he

wrote to Petitioner, informing him that he was waiting to hear from the North Carolina Appeals Court. In November, counsel states that he told Petitioner that "we are just awaiting a decision by the Court. A decision could come any day, or could be months in the future. There is simply no way for me to predict when the Court will act." *(Id.,* ¶ 7) While it is true that counsel could not *predict* when the court would act, he could have simply called to check on the status of the writ for certiorari. Despite his concern, counsel waited until February, 1999 to make his inquiry. Counsel made a decision in each instance, first in September, then in November, and again in January, to take the time to write Petitioner, but to not take the time to inquire about the status of the petition for certiorari. Had counsel called the state court in November, he would have found out about the denial of the petition for certiorari *prior to* the running of the one-year period. Petitioner may be charged with counsel's actions and the foregoing facts demonstrate that the alleged lack of notice was not a circumstance external to Petitioner—rather, based on the facts as alleged, counsel's choice not to inquire was a contributing cause for any lack of notice. This weakens the proposition which Petitioner must establish, that he was prevented from filing by external circumstances beyond his control. Moreover, while the foregoing facts, taken individually, might not indicate a lack of diligence on counsel's part, these facts taken together also make counsel's diligence a close question.

Further, although Petitioner lays the blame for the five month delay on either the United States Postal Service or the state court, Petitioner has demonstrated no reason that this must be so. In his declaration, counsel states:

> Undersigned counsel never received his copy of the September 14, 1998 Order in the mail. My office is in my home, my mail is delivered directly through my

front door, and I personally review the incoming mail every day. I did not receive it.

(Pr. Appendix of Exhibits, Declaration of Paul M. Green, ¶ *6)* This statement does not set forth with particularity the conditions at counsel's home and fails to address directly, or account for, the possibility that the order was lost by someone other than counsel after the mail was delivered but prior to counsel's personal review.

The Court also notes the difficulty of Petitioner's proof. Even viewing all of Petitioner's allegations in the light most favorable to him, at best he could be said to have established that counsel's copy of the order denying certiorari was lost sometime between when the North Carolina Court of Appeals issued the order and the time when counsel personally reviewed his mail, possibly while it was handled by the state court system, the postal system, or by someone at counsel's house. (This would certainly fall short of proof that Petitioner was actively mislead, as the Fifth Circuit has required. *See Coleman,* 184 F.3d 398.) Given the nature of the remedy Petitioner seeks, the mere *possibility* that "external forces" may have been responsible for the loss of the order is simply insufficient to trigger such an extraordinary measure on Petitioner's behalf. Considering all of the facts, especially Petitioner's lack of diligence, it is abundantly clear that the present circumstances simply do not warrant equitable tolling.[1]

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[1] This Court's own research reveals that, in the somewhat analogous situation where a party requests relief from the time limit for filing an appeal based solely on the assertion that the litigant failed to receive notice from the clerk of the entry of an order or judgment, the Fourth Circuit has held that such relief is barred by Fed. R. Civ. P. 77(d). *Hensley v. Chesapeake & O. Ry. Co.*, 651 F.2d 226, 229 (4th Cir. 1981). While it may be noted that Rule 77(d), by its own language, applies only to federal district court clerks, the underlying rationale for the rule, that notification by the clerk is merely for the *convenience* of the litigants, *id.*, is germane to the present circumstances.

Finally, the Court has reviewed Petitioner's claims of witness coercion, ineffective assistance for failing to object to alleged witness coercion, conflict of interest between Petitioner and his trial counsel, and ineffective assistance for alleged failure to raise the foregoing issues on appeal. Ultimately, each of these issues is without merit. Accordingly,

IT IS RECOMMENDED that Respondent's motion for summary judgment (Docket No. 5) be granted, and that judgment be entered dismissing this action.

/s/ P. Trevor Sharp, Magistrate Judge
March 24 ,2000

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RONALD STEVEN PHILLIP,	)	
Petitioner,	)	
v.	)	**1:99CV00243**
NORTH CAROLINA	)	
ATTORNEY GENERAL and	)	
RANDY LEE, Superintendent,	)	
Respondents.	)	

O-R-D-E-R

On March 24, 2000, in accordance with 28 U.S.C. § 636(b), the Recommendation of the United States Magistrate Judge was filed and notice was served on the parties in this action and a copy was given to the court.

Within the time limitation set forth in the statute, counsel for Petitioner objected to the Recommendation.

The court has appropriately reviewed the portions of the Magistrate Judge's report to which objection was made and has made a de novo determination which is in accord with the Magistrate Judge's report. The court therefore adopts the Magistrate Judge's recommendation.

IT IS THEREFORE ORDERED that Respondents' motion for summary judgment [Pleading no. 5] be **GRANTED,** that Petitioner's motion for habeas corpus [Pleading no. 1] be **DENIED,** and that this action be dismissed with prejudice. A judgment dismissing this action will be entered contemporaneously with this Order. A certificate of appealability is not issued, the court finding that no substantial issue is presented.

/s/ William L. Osteen
United States District Judge
July 20, 2000

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-7141

RONALD STEVEN PHILLIP,
Petitioner-Appellant,
versus
RANDY LEE, Warden, Caledonia Institution,
Respondent-Appellee,
and
NORTH CAROLINA ATTORNEY GENERAL,
Respondent.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, District Judge. (CA-99-243-1)

Submitted: November 9, 2000 Decided: November 15, 2000

Before WILKINS, WILLIAMS, and MOTZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Paul M. Green, Durham, North Carolina, for Appellant.
Clarence Joe DelForge, III, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, for Appellee.

PER CURIAM:

Ronald Steven Phillip appeals the district court's order granting summary judgment to the Respondents and denying relief on his petition filed under 28 U.S.C.A. § 2254 (West 1994 & Supp. 2000). We have reviewed the record and the district court's opinion accepting the recommendation of the magistrate judge and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. See Phillip v. Lee, No. CA-99-243-1 (M.D.N.C. July 21, 2000).* We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

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* Although the district court's order is marked as "filed" on July 20, 2000, the district court's records show that it was entered on the docket sheet on July 21, 2000. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date that the order was physically entered on the docket sheet that we take as the effective date of the district court's decision. See *Wilson v. Murray, 806 F.2d 1232, 1234-35 (4th Cir. 1986).*